



Bay-Delta Conservation Plan: NEPA for Corps Permit Decisions

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Background

The Bay Delta Conservation Plan (BDCP) is a Habitat Conservation Plan (HCP) being developed under the federal Endangered Species Act (ESA) by the California Department of Water Resources (DWR) to promote the recovery of endangered, threatened and sensitive fish and wildlife species and their habitats in the Sacramento-San Joaquin Delta in a way that will improve the reliability of water exports.

If approved by the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS), the BDCP would provide “take” under Section 10 of the ESA for various actions, including the following:

- State Water Project (SWP) diversion and maintenance from the existing SWP points of diversion at Clifton Court Forebay and Barker Slough Pumping Plant;
- SWP Operation and Maintenance of the Skinner Delta Fish Protective Facility and Banks Pumping Plant;
- Construction, operation, and maintenance of a new SWP north of Delta intake facility and conveyance (pipeline or canal);
- Construction, operation, and maintenance of a new SWP North Bay Aqueduct intake facility and conveyance (pipeline or canal);
- Numerous habitat restoration actions to restore: 65,000 acres of freshwater and brackish tidal, subtidal, and transitional habitats; 20 linear miles of channel margin habitat; 5,000 acres of riparian habitat; 2,000 acres of grassland habitat; 400 acres of nontidal perennial emergent wetland and nontidal perennial aquatic habitat; up to 89 acres of vernal pool complex habitat; and 320 acres of managed seasonal wetland habitat; and
- Numerous physical and operational alterations to the Yolo Bypass to improve fish passage and enable 10,000 acres to be subject to an increased duration and frequency of inundation.

A joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) is being prepared under the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA), respectively. The CEQA lead agency is DWR and the NEPA lead agencies, serving jointly, are the Bureau of Reclamation (BOR), USFWS and NMFS. The Lead Agencies intend for the EIR/EIS to be a programmatic document to support the issuance of incidental take permits under state and federal endangered species acts for implementation of all BDCP actions. The EIR/EIS would also provide project-level detail for the proposed construction of a new SWP north of Delta intake facility and conveyance and the operations of the new intakes and the existing SWP facilities. The Corps agreed to be a cooperating agency on the EIR/EIS in November 2008.

The Corps has jurisdiction over certain actions to be covered in the BDCP through its authorities under Section 404 of the Clean Water Act (CWA 404) and Sections 10 and 14 of the Rivers and Harbors Act of 1899 (RHA 10 and 14). Actions that involve a discharge of dredged or fill material into waters of the U.S. under CWA 404 and/or structures or work located in, under or over navigable waters under RHA 10 require a Department of the Army permit through the Corps’ Regulatory Program. The Regulatory

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Program is administered by the District's Regulatory Division. Alterations to Federal projects, including the Sacramento River Flood Control Project and the San Joaquin River and Tributaries Project, require permission under RHA 14 (also known as Section 408). Permission may only be granted if the alteration will not be injurious to the public interest and will not impair the usefulness of the Federal project. Section 408 is administered by and processed through the District's Operations Branch. Corps Headquarters approval may be required for some Section 408 actions. Not all actions being proposed as part of the BDCP are subject to the Corps' jurisdiction under CWA 404, RHA 10 and/or Section 408. As such, the Corps will only make permit decisions for individual actions under the BDCP that involve impacts to wetlands, waterways or facilities constructed by the Corps.

One of the first BDCP near-term actions DWR proposes to undertake is the construction of new water intakes, a new water conveyance facility, and new operation regime of the SWP. This action is identified as "Conservation Measure 1." The Corps' jurisdiction over this near-term action is CWA 404, RHA 10 and Section 408. The proposed schedule for receiving permission from the Corps for this action, as well as future actions, is dependent on many variables. The Corps continues to meet, consult, and coordinate with DWR and other Federal agencies to ensure all parties understand the necessary requirements for Corps permissions.

Corps NEPA Compliance Strategy

As a cooperating agency, the Corps intends to use the EIR/EIS to the maximum extent possible to facilitate decision-making. At the program level, the EIR/EIS will evaluate different regional alternatives to conserving species and ensuring a reliable water supply. The Corps will recognize and utilize the BDCP EIR/EIS as a programmatic document upon which later action-specific NEPA documents would rely. The lead agencies also plan to provide project-level information for Conservation Measure 1 in the EIR/EIS. Provided the EIR/EIS includes detailed alternatives and impact analysis concerning this action, the Corps would adopt the EIR/EIS and make a record of decision.

For all BDCP actions, the goal is to have the BDCP EIR/EIS and subsequent NEPA documentation address Corps permitting requirements. Inclusion of this information in NEPA documents will improve coordination, facilitate the public review process, and reduce the amount of time needed to make a permit decision. BDCP project-level NEPA documents should include the following:

1. Overall Purpose. The NEPA document should include an overall purpose statement for compliance with the 404(b)(1) guidelines for any action that involves a discharge of dredged or fill material into waters of the U.S. and requires an individual permit. The overall purpose statement, which must be approved by the Corps, should be consistent with the purpose and need in the BDCP EIR/EIS.

2. Alternatives. The alternatives analysis in the NEPA document should be sufficiently thorough for the Corps to demonstrate compliance with the 404(b)(1) guidelines. The analysis should include relevant details on practicable alternatives to the action that would have less impact on the aquatic environment such that the Corps can make a permit decision without additional alternatives analysis. During the NEPA document preparation, the Corps should be asked to concur with the range of alternatives, as well as the criteria upon which the alternative will be evaluated. If sufficient information is not included in the NEPA document, the Corps' will complete a separate 404(b)(1) analysis and determine the Least Environmentally Damaging Practicable Alternative when reaching a permit decision.

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3. Mitigation Sequencing. Specific measures that will be taken to avoid, minimize and compensate for impacts to waters of the U.S. resulting from the individual action should be described in the NEPA document. These measures include a compensatory mitigation proposal. A final plan for compensatory mitigation, prepared in accordance with 33 CFR Part 332, must be approved by the Corps before a permit decision is made.

4. Delineation of Wetlands and Other Waters of the United States. The NEPA document should include an assessment of the location, type and quality of wetlands and other waters of the U.S. that would be impacted in the vicinity of the proposed action, as well as the alternatives. Before a permit decision can be made, wetland delineations will need to be confirmed by the Corps.

5. Navigation Impacts. The NEPA document should analyze the effects of the individual action on commercial and recreation navigation in the Delta and major waterways.

6. Flood Risk Impacts. The NEPA document should disclose impacts to flood risk, including transfer of risk and residual risk, in the action area and throughout the flood system, both individually and cumulatively. As with any document including action-specific coverage, the NEPA compliance document needs to adequately support the final design of the project.

7. Cumulative Impacts. A cumulative impacts analysis is needed to comply with NEPA and the Section 404(b)(1) guidelines. The cumulative impact analysis should consider the effects of past, present and reasonably foreseeable actions on wetlands and other waters of the U.S.

8. Executive Order 11988. The NEPA document should demonstrate compliance with Executive Order 11988, Floodplain Management.

Need for Additional NEPA Documentation

The EIR/EIS currently under development contains an action-level analysis of the impacts of Conservation Measure 1 on the human environment. While this level of analysis is adequate to support Corps permitting decisions for CWA 404 and RHA 10, it may not be sufficient to support permission for Section 408. A Section 408 decision will only be made by the Corps after receiving a 65% level of design. If the 65% design is significantly different from the project outlined in the EIS/EIR, additional or supplemental NEPA may be required.

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